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Piracy, Navies and the Law of the Sea: the Case of Somalia

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Abstract

This contribution concentrates on the legal aspects of piracy and tries to explain some of the practical problems which modern navies experience in their fight against piracy and maritime violence off Somalia. The UN Law of the Sea Convention of 1982 provides a traditional though largely deficient set of rules for control and counter measures. Modern legal instruments such as the SUA Convention of 1988 as amended, recent resolutions of the UN Security Council and regional treaties try to fill the loopholes. Against this background the paper discusses e. g. the law of boarding and investigation of suspicious vessels, the arrest and penal prosecution of criminals and the right of self-defence in case of an imminent attack. The international mandates and the national rules of engagement in which the navies operate reflect these ambiguities that result in a loss of momentum. After all piracy is not an act of war, but a crime. In conclusion a political solution on land is indispensable as the navies and coast guards can only fight the symptoms and not the causes of crime and unrest in a failed State.

Key words: Piracy/Maritime Violence and the Law of the Sea, SUA Convention, UN Security Council, International Mandates (UN, NATO, EU) Against Piracy, National Rules of Engagement.

Piracy is rearing its ugly head again. According to current reports of the International Maritime Bureau (IMB) Piracy Reporting Centre in Kuala Lumpur[1] the year 2008 ended with a new record of nearly 300 reported acts of piracy and armed robbery posing a serious threat to the lives of seafarers, the security of the maritime transport industry and the safety and security of coastal States. Despite massive naval efforts in the Gulf of Aden piracy continues in 2009 at a high level and an expanding geographical scope to include large parts of the North-Western Indian Ocean. Piracy attacks around the world doubled in the first six months of 2009 to 240 from 114 compared with the same period in 2008. The rise in numbers is due almost entirely to pirate activities off Somalia with 130 attacks and 31 hijackings. The vast expanse of the oceans is an ideal hiding place for all kinds of illegal activities. But before giving an overview of existing international legal instruments in the fight against piracy we have to make clear that maritime violence is also a political problem.

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1 The International Chamber of Commerce (ICC) is operating the International Maritime Bureau (IMB), based in London, with its Piracy Reporting Centre (PRC) based in Kuala Lumpur/Malaysia. The annual report 2008 of the IMB lists 293 acts of piracy, 889 seamen taken hostage, 11 killed and 21 missing; for past and subsequent reports see: www.icc-ccs.org.

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1 Piracy in a Political Context

A "pirates' paradise" like the Gulf of Aden can only develop when weak States ("failed States"), lawless societies, political disorder and impoverishment of the populations coincide. The chaos on land is fueled by political and economic instability and the proliferation of weapons. Consequently there is no coastal State control over adjacent seas. When it is impossible to earn money decently, then the unemployed fisherman may become a pirate and the jobless teacher an interpreter for ransom negotiations. Even more so, it may be argued, the poor fisherman of Somalia may turn into a pirate when he sees foreign fishing fleets exploiting the living resources of the 200 mile zone of Somalia, including its rich tuna stocks, while unidentified vessels are dumping illegal waste. It is from these origins that piracy off Somalia turned into real big business of organized crime. Anarchy on land easily leads to piracy at sea[2].

The community of States, including the UN, the African Union and not to forget the rich Arabian oil states allowed chaos to develop in Somalia for over 18 years now. Today the world is confronted with the consequences of bad governance and the international shipping community has to pay the bills. In other words: a political solution *on land* has to be found to eliminate piracy. Unfortunately, so far no political concepts are at hand. Navies and coast guards can deal only with some of the worst manifestations. They cannot solve the basic problem.

Moreover, piracy is part of a larger problem which can best be named "maritime violence". Although this term is not (yet) established in international law[3], it illustrates a growing variety of illegal acts at sea including piracy, armed robbery, slave trade, illegal migration, trafficking in human beings, illicit drugs, international terrorism, transnational organised crime, illegal movement of nuclear, chemical, biological and materials as well as illegal disposal of waste at sea.

Readers should be aware that the United Nations Convention on the Law of the Sea (UNCLOS), in force since 1994 and binding upon 158 parties[4], is largely regarded as the "constitution of the oceans". Unfortunately, the section on piracy[5] is full of gaps regarding counter-measures and other security aspects. Domestic law may offer some rules for these crimes under the criminal and police codes of individual States but national law cannot cope with the international dimension.

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2 Robert D. Kaplan, "Anarchy on Land Means Piracy at Sea", *New York Times*, April 11, 2009, online version: www.nytimes.com/2009/04/12/opinion/12kaplan.html? (accessed September 29, 2009).

3 Max Mejia and Proshanto K. Mukherjee, "Selected issues of law and ergonomics in maritime security", *Journal of International Maritime Law* 10 (2004): 316–326, refer to p. 321.

4 UNCLOS member states are 157 States and the European Community, see: *Law of the Sea Bulletin* no. 68, 2009: 1.

5 For the text and current developments of UNCLOS, see: www.un.org/Depts/los/index/htm (accessed 15 September 2009); all articles mentioned hereinafter without further indication are articles of UNCLOS.

At the outset definitions are decisive: acts of piracy have disrupted sea trade for thousands of years. Acts of terror are a novel development of our times. Both are acts of violence. However, they differ not only in the historic background but in the motive of the person responsible[6].

- The **pirate** is an opportunistic offender interested in financial gain at a low risk. He is after an easy prey, valuable cargo, cash or ransom. In fact, according to reports published by IMB,[7] most cases of piracy and armed robbery involve the theft of relatively low cost items, occasionally called "subsistence piracy". Today we are confronted with the highly sophisticated and violent hijacking (seizure) of ships on the high seas against ransom (Somalia).
- The **terrorist** is acting on political, ideological or religious grounds. His aim is not to capture ships but to intimidate states, blackmail society and overturn states and governments by massive attacks against targets of high symbolic value or against soft targets with a maximum of damage. He is ready to die for his cause.

Both types of offenders tend to consume drugs[8] and they do not care for legal or moral standards. But the proportions of damage differ: the pirate leaves us with moderate property losses and a limited number of injured or killed persons while the terrorist is after a maximum "catastrophic" damage. In both cases innocent people are the victims.

Traditionally the term "piracy" is used for piratical acts on the high seas outside the territorial sea of States while "armed robbery" is the term for such acts inside the territorial sea of 12 n.m. In both cases these individual acts are regarded as a crime which have to be corrected by seizure and by penalties – however under two different legal regimes. In the case of armed robbery inside the 12 n.m. zone only authorities of the coastal State are entitled to respond. In the case of piracy on the high seas warships and government ships of all States are entitled to counter measures. This "dual-regime" follows from the anti-piratical provisions of arts. 100 to 107 of the UN Law of the Sea Convention (UNCLOS) which refer only to piracy on the high seas.

On the other hand, terrorism is an attack against society as a whole, against a State or a group of States. Terrorism is an attack on peace and security and therefore more aligned to warfare and military defence. A good example of response against terrorism is "Operation Enduring Freedom OEF" with its UN mandate to control terrorist movements at the Horn of Africa since 2001 based on the legal concept of self-defence.

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6 See Mejia and Mukherjee, *Selected Issues of Law and Ergonomics*, refer in particular to page 320. Refer furthermore to Max Mejia and Proshanto K. Mukherjee, "The SUA Convention 2005: a Critical Evaluation of its Effectiveness in Suppressing maritime Criminal Acts", *Journal of International Maritime Law* 12 (2006): 170–191.

7 See International Maritime Bureau, "Piracy and Armed Robbery Against Ships Annual Report 1 January–31 December 2008", London (2009); annual reports have been published by IMB since 1996.

8 "Terror und Angst", *Der Spiegel*, July 6, 2009, 34–36. Patrick Marchesseau, *Geiselnahme auf der Le Ponant* (Neuilly-sur-Seine: Michel Lafon Publishing, 2008), 118.

In recent times the border line between piracy and terrorism has become increasingly vague. The pirates of Somalia operate both in coastal waters and on the high seas hundreds of miles off the coast with seagoing "mother ships" and speedboats. They are highly organized in gangs with a hierarchy, a recruiting system and sophisticated networks. They use military weapons and uniforms, radar, AIS and other means of intelligence and information. Contact persons ashore and in other countries help to guide their operations including the negotiation of ransom money. A large part of the ransom money is reinvested in new arms and equipment[9]. It is argued that ship owners and States who pay the ransom finance the pirates' business and allow it to grow. There are rumours of protection money being paid to Islamic terrorist organisations who dominate parts of Somalia. Terrorist organisations may use pirates as their "agents" or turn to piracy as an easy source of income and for illegal transports of weapons and persons. Moreover, given the real life at sea, it is nearly impossible for the master of a ship to get a clear idea whether his opponent is a pirate or a terrorist. Thus, old legal definitions help little, when confronted with an attack out of the blue by an unidentified adversary.

In fact organized piracy, like in the case of Somalia, becomes increasingly aligned to terror and consequently deserves a military answer. "Terrorist piracy" is becoming a term for these developments of an unholy alliance with Islamists, while the French historian Fernand Braudel spoke of "piracy as a secondary form of war"[10].

The picture is even more complicated when looking into the options for "robust" or military countermeasures. Modern warships with their precision weaponry are basically built and trained to fight each other ocean-wide. In the case of piracy or terrorism they are confronted with non-state actors. It is nearly impossible to fight criminals onboard a captured vessel without endangering innocent hostages. The danger of escalation of over-reaction is great and diplomatic incidents are generated easily if collateral damage happens to third parties.[11] Thus warships have to deal with an asymmetric threat which requires another set of flexible reactions in a mixture of deterrence, speed, behaviour, diplomacy and small arms. The anti-piracy toolbox is a real challenge for modern navies and requires new answers for "littoral warfare". For the time being the national "rules of engagement" normally circumscribe the scope of measures (see below 5).

For each of these measures, the military power, the political will, and a legal justification are the necessary prerequisites. In the further course of the paper the legal instruments will be discussed in some detail in the following order:

9 Capt. Mukundan, Director ICC International Maritime Bureau, in his presentation "The Effects of Maritime Terrorism and Armed Robbery on Sea Trade", Hamburg, September 24, 2008.

10 See Kaplan, *Anarchy on Land Means Piracy at Sea*.

11 India sank a fishing trawler under the flag of Thailand mistaking it for a pirates' mother ship in November 2008.

- the UN Law of the Sea Convention
- other international conventions
- the UN Charter
- international anti-piracy mandates

2 The Anti-piracy Rules of the UN Law of the Sea Convention

The UN Convention on the Law of the Sea (UNCLOS) of 1982, in force since 1994 for 158 parties deals with piracy under arts. 100–107. Even States such as the US, Turkey, Israel, Venezuela, Iran and North Korea which have not yet ratified UNCLOS are bound in so far as UNCLOS represents customary international law or reiterates the provisions of the High Seas Convention of 1958, as is the case with the articles on piracy[12]. Policing rights and military rights depend largely on the zoning regime of UNCLOS while most rules for safety and security at sea are codified in the "High Seas" part of the Convention[13].

2.1 The Zoning Regime of UNCLOS

The zoning of the oceans under UNCLOS is the basic pattern for rights of control and intervention against illegal activities. As a general rule the flag State shall effectively and exclusively exercise its jurisdiction and control over ships flying its flag[14]. It follows from the *flag state principle* that maritime authorities, warships and government ships may inspect, control and police only vessels of their own flag everywhere on the high seas as well as in zones of that State's jurisdiction[15]. Ships under a foreign flag enjoy the complete freedom of navigation on the high seas, with a few exceptions to be discussed below.

The full sovereignty of coastal States has to be respected, and can be enforced, within the *territorial sea* of 12 n. m. where criminal and civil jurisdiction entirely[16] rests with the coastal State. This is the reason why *armed robbery* (and acts of terror) if committed inside the territorial sea can only be prosecuted by the coastal State authorities and not by warships of other nations unless the coastal State has consented[17] to policing powers by another State. Apart from the right of innocent passage all maritime uses inside the territorial sea are under the sole authority of that State and consequently warships or government ships from third States are not allowed to exercise police powers. An inconvenient side-effect is that the territorial sea of "rogue states" may be abused as a hideaway for pirates, for smuggling or other illicit activities.

As regards the *exclusive economic zone* of 200 n. m., ships under all flags enjoy all freedoms of navigation and over-flight according to arts. 56 and 58. The coastal State

12 Arts. 14–21 of the High Seas Convention of 1958 are identical with arts. 100–107 of UNCLOS 1982.
13 UNCLOS Part VII, arts. 86–120.
14 Art. 92.
15 Art. 94.
16 Arts. 27 pp and art. 111.
17 Consent may be provided by treaty or on an *ad hoc* basis.

has enforcement rights only over activities related to its sovereign rights over living and non living resources. Furthermore, it has jurisdiction with regard to artificial islands, marine scientific research and the marine environment, allowing for limited control rights over foreign shipping if these "functional" coastal interests are violated inside the EEZ. All coastal States control rights end at the 200 n. m. limit[18].

Apart from these "functional" control rights of the EEZ, the regime of high seas (navigational) freedoms applies, both inside the EEZ and on the *high seas* proper. In particular arts. 88–115[19] are relevant also in the fight against piracy as they contain some control rights which refer to illegal acts. As mentioned above the exclusiveness of the flag State's jurisdiction is not absolute. There are a few examples of cases of distress or criminal acts in which third States share certain rights with the flag State. Given the fact that ships in distress, illegal migration, trafficking in drugs and slave trade, frequently occur at the Horn of Africa these rights of intervention or control can be invoked in individual cases. Reports[20] point out how serious the situation is with regard to migration at the Horn of Africa. However, potential criminal activities further complicate the whole situation. This is why in the following paragraphs the legal situation with regard to rendering assistance, illegal activities and rights to visit should be summarized.

2.2 Duty to Render Assistance

In the first place art. 98 codifies for all States the *duty to render assistance* to any person found at sea in distress or in danger of being lost. Based on customary humanitarian or religious traditions this rule applies irrespective of zones of jurisdiction *at sea,* i. e. everywhere at sea, even in internal waters of a foreign State. The reason of distress may be an accident or a criminal act. A special consent of the coastal State is not required as "assistance entry" is based on customary international law. It justifies all reasonable action to save the person in need, be he the victim of piracy or a shipwrecked

18 Readers should be aware that continental shelf rights may extend beyond 200 n.m., see: arts. 76 pp.

19 Arts. 87 and 58 (1) and (2).

20 The United Nations News Centre reported on 15 September 2009 based on information provided by UNHCR, available online at http://www.un.org/apps/news/story.asp?NewsID=32056&Cr=gulf+of+aden&Cr1= (accessed September 25, 2009) about three smuggling incidents in the Gulf of Aden involving 16 persons which lost their lives and 49 persons missing and presumed dead. The spokesperson of UNHCR confirmed that there is an increasing number of larger smuggling vessels putting lives at risks. According to the UN News Centre a "total of 860 boats and 43,586 people have made that journey" between the Horn of Africa and Yemen this year "adding that some 273 people have drowned or are missing at sea and presumed dead. In the same report the UN human rights chief Navi Pillay is quoted. "Countless migrants fall prey to human traffickers who prosper the most where government scrutiny is at its weakest," she told the 12th session of the UN Human Rights Council in Geneva. "States have an obligation to respect, protect and fulfill a wide range of human rights of all individuals under their jurisdiction, including all migrants, regardless of their immigration status." According to the UN News Centre "Ms. Pillay accused authorities and ships of violating international law when they reject or ignore the pleas of migrants stranded at sea."

person. Prevention and prosecution of criminals is not covered by this duty, nor is art. 98 a legal basis for salvage of vessels and cargo. Nevertheless art. 98 can be invoked on the spot by captains and commanding officers who stand up for their beliefs in cases where the legal situation is unclear. As a rule captains will inform the coastal State authorities immediately of all actions taken.

2.3 Illegal Activities

In the case of *slave trading* the flag state shall prevent and punish this crime. Only the flag State may seize the ship or arrest those on board. Slaves who manage to escape and take refuge on board another ship are *ipso facto* free under art. 99. At least art. 110 *right of visit* provides for warships of all nations being justified to board in case of suspicion. If the ship is found to be engaged in slave trade the warship may verify the flag and report its findings to the flag State of the inspected vessel and – hopefully – the slaves are free but there are no more immediate consequences for the slave trader. It is unbelievable why such a poor rule found its way into the UNCLOS treaty which is normally referred to as the (modern) "constitution of the oceans".

A similar weak approach applies for *illicit traffic in narcotic drugs*, art. 108. All States shall co-operate in the suppression of illicit traffic and flag States may request the co-operation of other States in their endeavour to suppress such traffic. As regards *unauthorized broadcasting* under art. 109 – a rare case in modern times – criminal prosecution is allowed for all affected States and arrest and seizure is justified only in conformity with art. 110.

One of the major loopholes of UNCLOS is the lack of efficient rules against *illegal migration.* This offence can be punished only if prosecuted in the contiguous zone, art. 33.

2.4 Right of Visit (Inspection of Vessels)

UNCLOS addresses explicitly only four offences, i. e. transport of slaves, traffic in narcotics, unauthorized broadcasting as well as piracy (see below), constituting what may be called universal crimes recognized under customary international law. In all four cases the responsibility of the flag State is reiterated while at the same time the *right of visit* for warships of all States is introduced in art. 110 in the form of *boarding*. The warship may board if there is reasonable ground for suspecting that the foreign ship is engaged in piracy, slave trade, unauthorized broadcasting or the ship is without nationality. The last case (suspecting that the ship is without nationality) may also serve as a legal basis for visiting suspicious small craft, notoriously refusing or showing no flag, but often engaged in piracy, illegal migration, organized crime, illegal weapon transport or other criminal activities. However, in any case the right of visit is restricted to verify the ship's flag. Only if suspicions of piracy etc. remain after the documents have been checked a *further examination* may follow. Thus, in the case of a fast pirate skiff showing no flag there is a control right which goes beyond the classical intervention rights of UNCLOS. Warships and government ships could use this right more extensively than they normally do.

Another interesting feature of art. 110 lies in its introductory phrase: "*Except where acts of interference derive from powers conferred by treaty, a warship…*" Here UNCLOS hints at the option of conferring interference rights by treaty to another State. In fact, bilateral boarding treaties between the US and certain partner States exist already (see below). Generally speaking, art. 110 can be used as a starting point for new treaty law for control rights in the case of modern maritime threats.

2.5 Piracy on the High Seas

A largely impractical concept applies to *piracy* under arts. 100–107. There is a duty of States in art. 100 to "*co-operate in the repression of piracy*", leaving the choice of action to the discretion of States. It is a duty to co-operate and not a duty to prosecute. The legal definition of piracy in art. 101 as "*any illegal acts…committed for private ends … and directed on the high seas against another ship…*" excludes

- acts of political or pseudo-religious terror,
- piracy and armed robbery *inside* territorial waters, where 80 % of all attacks occur,
- the prosecution of preparatory acts of piracy (speed-boats and mother ships hovering around and waiting for a suitable target are strictly speaking not committing acts of piracy in the sense of art. 101),
- finally, art. 101 is not applicable if the criminal act involves only *one* ship (e.g. when pirates have sneaked onboard a vessel with the intention to capture it), the so-called "2-ship-rule".

When it comes to countermeasures and interdiction under art. 105 every State may seize a pirate ship or a ship under the control of pirates, arrest the persons, seize the property and institute criminal proceedings. Only warships and government ships may execute these options which are rights and not duties. Here the question arises whether vessels operated by private security firms, such as *Blackwater Worldwide* may participate in anti-piracy operations. This could be a clear breach of art. 105 because the Blackwater vessel, owned by a private firm and motivated by private gain, could be classified a pirate vessel itself once it uses force in the sense of art. 101 against another ship, unless clearly authorized by a flag State like a 17th century type privateer[21].

After all piracy is a crime and not an act of warfare. Navies and police forces are in troubled waters when it comes to prosecution and punishment. Nothing is said in UNCLOS with regard to most of the practical anti-piratical steps the warship may wish to use after pirates have been taken prisoner. In these cases national law is applicable. Once pirates or terrorists have been arrested by a navy vessel national criminal law of that State applies. According to personal conversations the author had with German Navy officers relating to the behavior and modus operandi of Somali pirates,

[21] The legality of private security contractors came up only recently and deserves a thorough legal analysis which goes beyond this article: For a first approach see: Sidney E. Dean, "Private Sicherungstrupps auf Hoher See? Blackwater und Co. bieten Schutz gegen Piraten", *Marine Forum* 84, no. 3 (2009): 26–31.

there is reason to suspect that the pirates are aware of the legal and factual constraints of foreign warships. In Germany, as in many other States, civilian police, public prosecutors, courts and judges have to take over from the navy. Sensible legal questions of national public and criminal law have to be observed, such as:

- temporary detention and formal warrant by a public prosecutor or judge
- questioning, securing and documenting of evidence
- possibility of extradition to the State of origin of the pirate or to a third State
- human rights safeguards
- charging and accusation by a criminal court which has jurisdiction over piracy
- legal counsel for the defence
- imprisonment and possible reprieve
- rights of asylum seekers

The Danish Navy had to release six pirates when they found out that the Danish courts have no jurisdiction over crimes committed on the high seas. The military personnel on German frigates is not entitled to formally arrest criminals. Many other navies are afraid of taking possible asylum seekers on board. Therefore many pirates are given the chance to sail back after handing over their arms[22]. The dilemma can be solved through bilateral treaties like the ones between some EU states and Kenya over the delivery of pirates for prosecution in Kenya[23]. The EU Commission has asked the UN to develop international prosecution laws for pirates. The establishment of an "International Piracy Court"[24] would be an attractive solution which would require a decision on UN level – either as an independent new court, or additional competencies for the International Tribunal for the Law of the Sea, based at Hamburg.

In conclusion the anti-piracy regime is a toothless tiger to the extent that there exists only

- a simple obligation to co-operate in the repression of piracy
- a definition of piracy that excludes armed robbery inside the 12 mile limit and that sticks to the "2-ship-rule"
- restrictions to the right of boarding suspected vessels
- a simple "authorization" to prosecute pirates (not a duty) and
- a lack of international rules regarding efficient criminal prosecution

Although there is consensus on the fact that piracy rules are outdated and inadequate to meet modern threats there seems to be little chance for amendment within UNCLOS. A formal review of the Law of the Sea Convention is theoretically possible under arts. 312 and 313. However, States parties to UNCLOS show no willingness to

22 Also US warships let pirates go in some instances after delivering their arms.

23 According to press reports the US and Kenya concluded a similar treaty on 16 January 2009.

24 The German Ministry of Defence has called for such a court. See http://www.nytimes.com/2008/12/23/world/africa/23iht-23germanpirates-FW.18893813.html (accessed October 9, 2009).

open up the delicately negotiated overall compromise of this convention. Instead hopes for new rules are with regional or functional agreements – and with the United Nations.

3 Prevention and Repression beyond UNCLOS

3.1 SUA Convention 2005

At this stage the question arises whether other legal instruments could serve as a basis for anti-piratical measures. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) of 1988[25] and its related protocol regarding unlawful acts against platforms (SUA Protocol of 1988) are in force since May 1, 1992. Some 150 States with more than 90% of world tonnage have ratified this first anti-terror convention for maritime space which was concluded in reaction to the 1985 attack on the *Achille Lauro*[26]. Most of the ratifications were collected after 9/11. SUA defines unlawful acts in art. 3, such as seizing control over a ship (or platform) by force, violating a person, or destroying a ship or its cargo. Member States are obliged to actively prosecute or extradite offenders and to adapt their domestic legislation accordingly.

In the years 2002 to 2005 the IMO prepared a revision of SUA 1988 ending up in the amended convention as SUA 2005 and Protocol 2005 (platforms). The new list of offences is a direct follow-up to UN Resolution 1540 (WMD resolution) and includes also acts

- to intimidate a population, or compel a government,
- involving the transport of explosives, radioactive, chemical or biological weaponry or related technology,
- transporting persons who have been engaged in SUA offences

At the same time SUA 2005 codified the delicate conditions for boarding a suspected vessel flying the flag of another State by facilitating the consent of the flag State in such a way that "*consensual boarding*" becomes a standard procedure. The details are to be found in the SUA 2005 version in art. 8bis. If a warship of a requesting State encounters a suspected vessel under the flag of another State party outside any territorial sea, it may (electronically) request the flag State's authorisation to board and take "appropriate measures". In that case the flag State shall either authorize or deny boarding. If the flag State does not grant the request, the requesting State must not board. However, under paragraph 5 (d) and (e) of art. 8bis the flag State may under two different modalities waive its right to grant consent by a formal notification to the Secretary-General of IMO in the interest of facilitating boarding. The first option is an "automatic consent" if the ship's nationality is not confirmed within four

25 For the text and current developments of SUA 1988/2005 and SUA Protocol 2005, refer to: www.imo.org/conventions (accessed September 15, 2009).

26 For a full and critical discussion of SUA 1988 and SUA 2005 refer to Mejia and Mukherjee, "Selected issues of law and ergonomics".

hours. The second option is a blanket pre-authorisation[27] without the four-hour rule.

These innovative boarding rules try to find a compromise between the flag State rights and the need to allow for expeditious controls. The negotiating forum was not the UN Security Council but IMO, *the competent international organisation,* as it is named throughout the Law of the Sea Convention in all aspects of maritime safety and environmental protection.

SUA 2005 shall enter into force 90 days following the date on which at least 15 States have ratified it. Unfortunately only seven States[28] have ratified – obviously a lack of interest on behalf of major seafaring nations, naval powers and EU Member States that is inexplicable given the wordy statements of politicians advocating the war on global terrorism. Therefore the UN General Assembly Resolution 63/111[29] calls urgently upon States to ratify the SUA treaties. At least SUA 1988 with its moderate rights of prosecution and extradition of terrorists is in force for some 150 States and there is still hope that SUA 2005 will become effective some day because SUA with its emphasis of terrorism provides also a link to piracy.

With a view to the weaknesses of the piracy regime of UNCLOS it has been discussed[30] that the SUA regime of prosecution and boarding could offer a complementary role in that it covers all acts of violence at sea irrespective of maritime borders(!). The UN Security Council has taken up this idea in its most recent anti-piracy resolutions 1846[31] and 1851 (see below) where the UN decided that during the next 12 months States and regional organizations may enter Somalia's territorial sea and land and use "*all necessary means*" to fight piracy and armed robbery. Under paragraph 15 of Res. 1846 the States parties to the SUA 1988 Convention are reminded "*to fully implement their obligations …for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia*". Thus, for the first time a clear statement was made in favour of the applicability of SUA to criminal acts of piracy.

With regard to the future, the broad concept of "maritime violence" as used in both SUA versions should be taken as a starting point for the coming legislation in all areas of security because this wording is a fitting generic term to cover all modern manifestations of violence ranging from terror, piracy, trafficking in arms and drugs down to "normal" criminal offences.

27 See Mejia and Mukherjee, *Selected Issues of Law and Ergonomics*, p. 181.

28 Costa Rica, Estonia, Fiji, Marshall Islands, Spain, Switzerland, Vanuatu, representing together 5% of the world tonnage.

29 UN General Assembly Res. 63/111, para 61–69, issued February 12, 2009.

30 See Mejia and Mukherjee, *The SUA Convention 2005*, p.183.

31 UN Security Council Res. 1846 (2008), issued December 02, 2008, unanimously adopted.

3.2 Bilateral and Multilateral Treaties

It has been mentioned above that the right of visit under UNCLOS art. 110 (1), though limited to a few criminal offences like piracy, slave trade etc. comprises the possibility to *confer acts of interference by treaty law* to another State or to other partners. Prominent examples of this practice are the bilateral boarding agreements of the United States with leading flag States on reciprocal controls of WMD materials. A prominent treaty on law enforcement against narcotic drugs, terrorism, smuggling, piracy etc. exists in the Caribbean Area[32]. A similar approach can be found with the European Community Fisheries Control Agency CFCA with elaborate procedures for boarding and inspecting fishery vessels at sea irrespective of flag and place by fisheries police forces of EU Member States on a reciprocal basis including monetary penalties.

Another example is the "Regional Co-operation Agreement on Combating Piracy and Armed Robbery (ReCAAP) against Ships in Asia[33] with its Information Sharing Centre ISC in Singapore, in force since 2006 for 14 States in Asia[34], with Indonesia and Malaysia abstaining. Here the number of incidents went down due to the increased presence of navies and coast guards (and the tsunami-catastrophe of 2004). Statistics show that when ReCAAP began operation in 2006 the number of attacks in the Malacca Straits was already well down from its height in 2004, largely due to the efforts of Malaysia[35] and Indonesia, the two States which are not members to ReCAAP although with the longest coast lines in the Straits. A similar "Maritime Organisation of West and Central Africa (MOWCA)"[36] was instituted in 2008 bringing together 20 States from Mauritania down to Angola. Finally, a "code of conduct to repress acts of piracy and armed robbery" was concluded on 29 January 2009 for the region of East Africa including the Gulf of Aden.[37]

Quite a different approach by NATO is the *Naval Co-operation and Guidance for Shipping (NCAGS)* concept which has been published in notices to mariners[38]. It describes the procedures of co-operation with merchant shipping in times of crisis, conflict and/or war and to NATO operations conducted under UN mandate. The participation of merchant shipping is strictly on a voluntary basis and free of charge.

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32 "CARICOM Maritime and Airspace Security Cooperation Agreement, 4 July 2008", *Law of the Sea Bulletin* no 68, 2009: 20.

33 Text in: www.recaap.org/about/pdf/ReCAAO%20Agreement.pdf (accessed September 25, 2009) and in: www.mofa.go.jp/mofaj/gaiko/kaiyo/pdfs/kyotei_s.pdf (accessed September 25, 2009).

34 Norway became the 15th Member State on August 31, 2009.

35 Kuala Lumpur/Malaysia is the location of the IMB Piracy Reporting Center PRC, see footnote 1 above.

36 "Memorandum of Understanding on the Establishment of a Sub-regional Integrated Coast Guard Network in West and Central Africa, July 2008", *Law of the Sea Bulletin,* no. 68 (2009): 51. Only 11 of the 20 States have signed.

37 17 States of the region met in Djibouti, of which nine (Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, Tanzania and Yemen) signed the code of conduct, consisting of four resolutions, on January 29, 2009; see *IMO press briefing* 03, 30 January 2009.

38 *Nachrichten für Seefahrer* Heft 1, 2008.

The protective measures range from routing recommendations, military protection, escort by military units, embarked liaison officers as "military pilots". However, convoy operations are excluded where merchant shipping has to comply with military orders. Thus, with a little bit of imagination treaty law can be used to create protective and/or repressive legal instruments for maritime security.

As an interim result we have to realize that international law is incomplete. It rather resembles a Swiss cheese: outwardly rather fat, but inside many holes and little substance. At that stage States are left with a last resort: the right of self-defence under UN law.

4 The UN Charter: Self-defence – an Expanding Concept

Among the fundamental rights of nations' self-defence, also called legitimate defence (*défense légitime*), is enshrined in the Charter of the United Nations in chapter VII within the framework of actions with respect to threats to peace and acts of aggression. Art. 51 reads:

> "*Nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…*"

Art. 51 was clearly designed as a defence against a *military* attack. It limits the right of self-defence to cases of an illegal armed attack by one State against another State as distinct from an ordinary breach of international law. It has to be an armed attack that must be real, imminent and overwhelming leaving no other choice of reaction. Moreover, the threat of attack is not sufficient so that "pre-emptive defence" is illegal. In any case the defensive countermeasures have to meet the test of proportionality to avoid excessive defence.

4.1 UN Resolutions on self-defence

The question is whether the use of weapons in self-defence could be a justifiable response for navies against maritime violence such as piracy, terror or other criminal acts, when the opponent is not a State-actor but an individual, a member of a gang, a religious fanatic or an ordinary criminal. Here, the 15 Member States of the UN Security Council have adopted two important Resolutions, both based on Chapter VII of the UN Charter, to take effective measures against

- **acts of terror** (Res. 1373 of 28 Sept. 2001[39]) and
- illicit trafficking of **weapons of mass destruction WMD** such as nuclear, chemical and biological weapons and their means of delivery (Res. 1540 of 28 April 2004[40])

39 UN Security Council Res 1373(2001) of September 28, 2001 as an immediate reaction to 9/11; see also UN Security Council Res. 1368(2001) of September 12, 2001.

40 UN Security Council Res. 1540(2004) of April 28, 2004.

For the first time the concept of self-defence was widened to include terrorists. Piracy is not mentioned in these resolutions because the Security Council still held to the traditional concept of piracy or armed robbery as an ordinary crime, committed by individuals. This changed at last in 2008 when the situation got out of control completely in the Gulf of Aden and in Eastern Africa. The UN Security Council as a "world legislator" [41] reacted and produced new rules of intervention against piracy and armed robbery at sea.

4.2 UN Security Council Resolutions on Piracy

As a first step **Resolution 1816** of 02 June 2008[42] decided unanimously that for a period of six months States co-operating with the Transitional Federal Government (TFG) of Somalia may enter the territorial waters of that State for repressing acts of piracy and armed robbery in a manner consistent with such action as permitted on the high seas. A possible infringement of the sovereignty was avoided thanks to the co-operation of the Somalian TFG[43] consenting to this measure and asking for international assistance. Thus some of the limitations of the anti-piracy regime of UNCLOS are lifted for the territorial sea of a failed State that has agreed in advance. Armed robbery inside the 12 miles can now be addressed by warships of co-operating States. Although this decision shall not be considered as establishing new customary law – a clause which was introduced by Indonesia and other States with a notorious record of piracy – it cannot be ignored that the Security Council was able to break new ground for this special case. It is after all one of the very few strong political statements of the Security Council.

With the following **Resolution 1838** of 07 October 2008[44] the Security Council expressed its concern over the continuing threat which piracy poses for the maritime convoys of humanitarian aid under the World Food Programme to the starving people of Somalia and to the safety of maritime routes. Moreover, the resolution encourages States to make use of Res. 1816 and fight piracy inside and outside territorial sea limits. It also hints at the necessity for an additional period of Res. 1816 which otherwise would end at 02 December 2008.

Resolution 1846 of 02 December 2008[45] prolonged the period for another 12 months, ending on 02. December 2009 and opened the mandate to fight piracy for States "*and regional organisations*"[46], thus taking note of the European mission "ATALANTA" that was about to begin (see below). Moreover, no. 15 of the text reminds States to

41 See: Introductory Note to UN Security Council Res. 1816, 1846 & 1851, by Jane G. Dalton, J. Ashley Roach and John Daley, *International Legal Materials* 48, no. 1 (2009): 129.

42 UN Security Council Res. 1816(2008) of June 02, 2008, for operational rights see no. 7 of this resolution.

43 See: preamble and no. 7 of UN Security Council Res. 1816(2008).

44 UN Security Council Res. 1838(2008) of October 07, 2008.

45 UN Security Council Res. 1846(2008) of December 02, 2008.

46 See nos. 9 and 10 of UN Security Council Res. 1846 (2008).

implement the SUA Convention which provides for parties to create criminal offences, establish jurisdiction, and accept delivery of criminals.

The latest **Resolution 1851** of 16 December 2008[47], referring to a written request for assistance by the TFG, goes even further. It allows States and regional organisations to undertake *all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.* The wording "in Somalia" is understood to include the land and air space. For the first time executive measures including a military intervention against the home bases of pirates in a foreign country is legally allowed provided, however, that any such measures are consistent with international humanitarian law. Like in earlier resolutions[48] no. 3 of this text calls upon States to conclude special agreements with countries willing to take custody and prosecution of pirates. This mandate is limited to a period of 12 months. The UN Secretary General advocates a multilateral stabilizing force for Somalia while some States may be thinking of air strikes and commando operations.

Another remarkable message is found under no. 9 of the text of Res. 1851 where the Security Council notes with concern that escalating ransom payments are fuelling the growth of piracy and that the lack of enforcement of the UN arms embargo of 1992 has permitted the phenomenal growth of piracy. In fact, the arms embargo on Somalia of 1992, which has been the subject of 13 UN S. C. Resolutions, failed completely – demonstrating the notorious helplessness of the UN.

All four resolutions reiterate the need to co-operate on a bilateral or regional basis through agreements of co-operation, surveillance, boarding and patrol. As mentioned above, a "code of conduct to repress acts of piracy and armed robbery" was concluded on 29 January 2009 for the region of East Africa including the Gulf of Aden.[49]

Nevertheless the UN Security Council, deciding with unanimity, showed its ability of reaction, flexibility and "law-making" imagination in a particular situation.

The combination of anti-piracy Resolutions and the encouragement of bilateral or regional action such as boarding agreements[50] and prosecution agreements is clearly one of the options for progress in the endeavour to create a universal framework against piracy. For the time being this solution focuses solely on the piracy problem off Somalia but it could be transposed by another resolution to other hot spots if necessary.

47 UN Security Council Res. 1851(2008) of December 16, 2008.

48 See no. 11 of Res. 1816 (2008) and no.14 of Res. 1846 (2008).

49 See footnote 36 above.

50 Conrad Ruppel, "Die Proliferation Security Intiative PSI – Eine Analyse und die Perspektiven." *MarineForum* 83, no. 12 (2008): 6.

4.3 Self-defence of Merchant Ships – To Arm or Not To Arm?

Another aspect is the question whether self-defence of merchant ships against terrorists or pirates is an option as well. Apart from self-defence in international law, as described above, the notion of self-defence is, primarily one of domestic law, in particular criminal law, embedded in the legal systems of practically all States. Merchant ships are in principle justified to defend themselves against an illegal imminent attack within the limits of necessity and proportionality. The domestic rules on self-defence (*défense légitime, Notwehr etc.*) of the flag-State will be applicable. Cruise ships, being threatened by terrorists, have for many years carried armed guards or mercenaries[51] but most other merchant vessels have been hesitant.

The reason why merchant ships rarely make use of self-defence is a matter of reasonableness and common sense. In the first place weapons on board are a sensitive issue. Many flag States and ports do not permit weapons being carried on board. The safe handling of weapons requires continuous training with arms which seamen normally lack. Moreover, armed guards on ships, whether military personnel or hired private guards, will raise liability issues. Insurance companies will regard the idea of armed guards as an additional risk. Labour law and trade unions draw a clear line between soldiers and seamen. Moreover, it is unclear whether the order to fire is to be given by the master or by the head of the armed security team on board with all the consequent liability that that decision entails. Thus, the legal basis is unclear while the risk of escalation is obvious. Therefore self-defence by captains and crew members in the form of armed reaction is strongly advised against. This is set out in the revisions to IMO Circulars 622 and 623 finalised in June 2009[52] dealing with guidance on piracy and armed robbery to governments and ship owners respectively.

But the use of defensive technologies, such as ship security alert and alarm systems, surveillance and tracking systems (shiploc), high pressure fire hoses, acoustic and microwave devices[53], laser-guns[54] and other non-lethal weapons, electric fences and mechanical barriers are among the legitimate defensive tools which merchant ships may apply, and often are advised to use on behalf of their shipping company or flag State. New technological developments, including ship design and new IT sensors and systems are becoming an option – and a market as well. In January 2009 a Dutch vessel successfully defended itself by firing flares and burning the pirates' speedboat. Molotov cocktails and firearms have been used in defence by Chinese and North Korean seamen.

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51 The cruise liner "MSC Melody" repelled an attack on April 24, 2009 north of the Seychelles, apparently using firearms.

52 IMO (2009), MSC.1/Circ.1333 "Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships" and IMO (2009), MSC.1/Circ.1334 "Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships."

53 Long Range Acoustic Devices LRAD and Active Denial Systems ADS (microwave).

54 So-called "directed energy weapons" may be classified as military weapons.

Nevertheless information and training for masters and crew to deal with such situations would be helpful to raise practical skills such as watchfulness, early warning, alarm systems, crew drills and communication with pirates.

5 International Mandates in the Fight against Piracy

It is due to the series of UN resolutions, beginning with the first anti-terror Res. 1373 in 2001 and ending in 2008 with Res. 1851 on piracy *in Somalia* that the community of States found a way to establish international missions based on a legal mandate within the scope of self-defence in international law. These missions are restricted to the waters of the Gulf of Aden and its vicinity.

5.1 Operation Enduring Freedom OEF

Based on UN Res. 1371(2001) the OEF mission has been operating for 8 years at the Horn of Africa on a mandate primarily to suppress terror activities and surveillance in the area. The flotilla consists of five to six frigates, supply vessels and reconnaissance aircraft of different NATO States, some of which like the US[55], France and the United Kingdom are also empowered to fight pirates. Within the movable Maritime Security Patrol Area (MSPA) a designated traffic corridor is established in the Gulf of Aden as an advisory route for transit navigation[56]. On 1 February 2009 the MSPA was shifted further south to clear the clutter of Yemeni fishing traffic and renamed the International Recognised Transit Corridor (IRTC). The command of the allied "Task Force 150" rotates among the participating States. In early 2009 the German frigate "Mecklenburg-Vorpommern" was in charge with a restricted German mandate to fight only terrorism. The OEF mission has proved to be successful in that it provided a clear picture of maritime traffic in the area, both local and transit traffic.

Early in January 2009 the US launched a new "Combined Task Force 151"[57] under US command to intensify the fight against pirates. The warships of non-NATO nations like China, Russia and India are invited to participate in this endeavour, although they prefer to escort merchant vessels of their own flag or interest, while Turkey and South Korea joined Task Force 151.

5.2 NATO Mission ALLIED PROVIDER

NATO decided on 27 October 2008 to set up the ALLIED PROVIDER mission consisting of a group of US, Greek and Italian warships to escort and protect ships transporting humanitarian goods of the World Food Program WFP into ports of Somalia to help the starving population. In a secondary role this mission was also empowered to fight piracy. The mission was terminated on 15 December 2008 when the EU took

55 "U.S. Navy Operations Against Pirates off Somalia" *American Journal of International Law* 102, no. 1 (2008): 169.

56 A new East-West transit route with two lanes of 5 n.m. width was established from 01 February 2009.

57 US 5th Fleet public affairs, Press release 001-09 of January 08, 2009.

over, but a new NATO mission[58] started in spring 2009 under the acronym Standing NATO Maritime Group 1 (SNMG) consisting of 5 to 10 vessels and under the command of Portugal. This task group joined the anti-piratical missions in the Gulf of Aden for some weeks in spring 2009 before sailing to East-Asian waters in June 2009.

5.3 EU Mission ATALANTA

The EU Council of Ministers decided on of 8 December 2008 to embark on the mission, called EU NAVFOR Somalia (operation "ATALANTA") in waters off Somalia. The first ever naval mission of the EU under the command of a British admiral[59], originally ending on 15 December 2009 has been extended by another decision of the Council of Ministers until 15 December 2010. The EU mandate is based on the European Security and Defence Policy ESDP and refers expressly to the relevant resolutions of the UN Security Council. If the EU is successful in its anti-piracy operations, the military role of the EU, it is hoped, will grow both inside and outside Europe[60].

Hinting at the weak points the European Parliament requested that Member States should develop "*clear guidelines for detention and prosecution of captured pirates*" and that "*there should be effective co-ordination with other naval vessels in the region*" [61]. Both aims have not been achieved. In fact, the problem of co-ordination of naval ships from more than 15 nations, operating under different alliances and mandates, either multilateral or purely national, leaves the pirates with ample opportunities and confuses the masters of transiting merchant ships who still have problems to whom they shall report and look for protection[62]. There is still no single point of contact. On the other hand, the Group Transit Scheme of ATALANTA has reduced the risks in the Gulf of Aden for those vessels that cooperate.

The EU mandate[63] stipulates under art. 2 (d) "…*necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery…*". Lit. (e) of the same article allows "…*to arrest, detain and transfer persons who have committed, or are suspected of having committed, acts of piracy…*

58 NATO. NATO extends counter-piracy mission. Nato Update, 24 April 2009. http://www.nato.int/cps/en/SID-AF4193DC-A861043C/natolive/news_53420.htm?selectedLocale=en (accessed October 1, 2009).

59 Decision of the EU Council of Ministers, EU *Official Journal* L 317/24.

60 Refer to: Robert Farley and Yoav Gortzak, "Europe vs. the Pirates", available online www.foreignpolicy.com (December 2008).

61 RSP/2008/2635 : 23/10/2008 – EP: non-legislative resolution, Resolution on topical subject (RSP), http://www.europarl.europa.eu/oeil/resume.jsp?id=5686272&eventId=1054440&backToCaller=NO&language=en (accessed 30 September 2009).

62 The OEF mission is guided by the US Command in Bahrain, while ATALANTA is guided by the British Naval Command in Northwood, U. K. which operates the Maritime Security Centre Horn of Africa MSCHOA, www.mschoa.eu. Additionally, a reporting point exists at UK Maritime Trade Organisation UKMTO in Bahrain.

63 EU NAVFOR Somalia (operation "ATALANTA"), Council Decision 2008/918/CSFP of December 08, 2008, EU Official Journal L 330/19; the detailed mandate of the mission is contained in Council Joint Action 2008/851/CFSP art. 2, EU *Official Journal* L 301/33–37.

and seize the vessels … as well as the goods on board". The details of transfer of arrested persons with a view to their prosecution are regulated in art. 12 which offers two options:

- either transfer to the authorities of the flag State which took them captive,
- or to a third State which wishes to exercise its jurisdiction and with which the conditions of transfer and humane treatment have been agreed. Participation of third States in the EU mission is encouraged[64].

With this mandate EU flagged warships can terminate by military force at least all imminent acts of piracy, as long as they happen. Preventive force against a hovering mother ship or speedboats in transit is not covered, nor is force allowed once the attack is over and the pirates are fleeing. On the other hand, arrest or detention of persons who have committed, or are suspected of having committed, as well as the seizure of vessels and arms are permitted whenever suspected pirates show up. In the case of arrest under lit.(e) the use of force is obviously not permitted. The wisdom of the differentiation in the use of force between the two cases may be questioned. The arrest of fleeing armed pirates may require military force, unless they surrender voluntarily[65].

The EU Member States provided altogether six frigates, a number of supply vessels and three reconnaissance aircraft. Those operating in the area are sailing under the EU flag shown on the masthead.

5.4 The Role of Rules of Engagement (ROE's)

A major dilemma is that navies are in a grey-zone of ambiguous international rules and regulations. At that stage the national navies resort to the so-called "rules of engagement (ROE's)" or "standing orders" which are issued by the legal services of ministries of defence in order to regulate the military scope of action for commanding officers who are responsible for operations at sea. These rules differ reflecting the national traditions, legal convictions and policies of States – and, as a rule, they are not made public. It comes as no surprise that joint missions, like those against pirates and terrorists, involving warships of different nations create problems of coordination and command when the national rules for the scope of military action differ.

In the case of anti-piratical measures the robust options of a warship may include, e. g., the following tools which should be addressed as instructions in national ROE's:

- diversion order against foreign vessels for further inspection in port
- warning shot (to stop a vessel)
- disabling shot (to immobilize a vessel)

64 See: preamble and art. 10 of the EU mandate, see footnote 64 above, pp. 33 and 36.

65 Only if the pirates open fire the warship may react in self-defence.

- deadly force as last resort
- seizure of vessel, arms and cargo
- sinking and rescue
- boarding of law enforcement teams (friendly boarding)
- boarding by force (opposed boarding); special forces are needed and losses[66] are conceivable
- detention or arrest of persons before, during and after an attack
- interrogation of persons, securing of evidence
- military security personnel on merchant ships
- private security personnel (mercenaries) on merchant ships
- a close blockade of ports is easier than monitoring an ocean
- landing operations with a choice between "going ashore light" and " going ashore big"[67]and, eventually,
- Q-ships (armed merchant ship provoking a pirate attack[68]).

6 Summary and Recommendations

This survey has shown on the one hand that much new legislation is underway to fill some of the many gaps in international law of the sea. The concept of self-defence is being expanded by UN resolutions to cover threats of terrorism and weapons of mass destruction. The problem of failed states has been addressed legally for the first time by UN Security Resolutions 1816 and 1846 opening up the right to prosecute piracy inside the territorial sea of a consenting failed state. Likewise the right of visit or boarding, traditionally limited under art. 110 to a few criminal acts on the high seas, can be broadened – at least on the basis of treaty law – into a regime of inspection and control over ships flying the flag of States parties to the same treaty. In these cases of consensual boarding it is possible to respect the flag state principle if the flag State consents either in advance or if consent can be requested and given within a very short time. The SUA 2005 Convention offers a viable model for these options while the Internet and other electronic means of communication allow for real-time contact between the requesting warship and the flag State. Finally, the concept of "maritime violence", as introduced by the SUA Convention, is a basis to build on new comprehensive security law.

In fact governments could do a lot more in developing new security law and better practices in the framework of the UN and IMO, ratify pending security conventions such as SUA 2005 and others, implement and enforce them and optimize efficient navies and coast guards. Strategically, the growing role of oceans in terms of transport and

66 See: shooting incident of 30 November 2008 when French special forces failed to board "Yénégoa Ocean", a tug boat under Panama flag and taken by Somali pirates; refer to: www.bakchich.info/article6383.html (accessed September 10, 2009).

67 "Somali Pirates Form Unholy Alliance with Islamists", *Spiegel Online*, April 20, 2009, available online at http://www.spiegel.de/international/

68 Malaysia converted a small container vessel for anti-piracy operations, manned by navy personnel. Maritime Security Center, EU NAVFOR Somalia, www.mschoa.eu/Fairplay (accessed September 12, 2009)

resources, environment and climate, safety and security will need law and order anyway.

Therefore it should be kept in mind that combating maritime violence requires a greater political focus. A long-term solution is only possible through a political settlement of conflict, lawlessness and poor governance in those parts of the world where maritime violence is generated as a consequence of problems that emanated on land. Most important, there must be the political will to do so. The European Union began recently to seek lasting solutions when Joe Borg, European Commissioner for Maritime Affairs, announced that development aid instruments will provide for a programme on "critical maritime routes" and a Fisheries Partnership Agreement with Somalia is conceivable once peace and stability are restored[69]. A donor conference of 23 April 2009, organized by the UN and the EU, collected more than USD 200 million for Somalia. Thus, "State building" becomes a crucial task for the development policy of our Governments. The role of navies, coast guards and police forces in the fight against maritime violence makes sense only if the intention is to contain the problem at sea until a political solution is achieved on land.

69 EU press release, "Maritime Security: protecting maritime transport from piracy": IP/09/83 of 21 January 2009, available at http://europa.eu/rapid/ (accessed October 1, 2009).